

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America,

Plaintiff,

v.

David Allen Harbour,

Defendant.

No. CR-19-0898-PHX-DLR

ORDER AND DETENTION ORDER

This matter is before the Court on the allegations of violations of pretrial release, which were referred to undersigned for all further proceedings (Doc. 268 at 2). The allegations are contained in the United States' Petition to Revoke Defendant Harbour's Pretrial Release (Doc. 267), the United States' Supplemental Petition (Doc. 290), and the United States' Second Supplemental Petition (Doc. 326). Defendant was provided notice of all the allegations against him in the Petition (Doc. 267), Supplemental Petition (Doc. 290), and Second Supplemental Petition (Doc. 326), and the parties have been provided full opportunity to present evidence and argument (*see* Docs. 293, 295, 310, 327, 338, 339, 344). This matter was taken under advisement (Doc. 344).

While the Court only references a small portion of the evidence and arguments in its conclusions below, the Court reviewed and weighed all of the evidence presented, considered the arguments made, and consulted applicable law in reaching the conclusions herein.

I. THE ALLEGED PRETRIAL RELEASE VIOLATIONS

In the United States’ Petition to Revoke Defendant Harbour’s Pretrial Release (Doc. 267), the United States’ Supplemental Petition (Doc. 290), and the United States’ Second Supplemental Petition (Doc. 326), the United States alleged that Defendant Harbour violated various conditions of his pretrial release. The alleged violations are set forth below along with the Court’s decisions regarding the allegations. The applicable standard of proof is probable cause for commission of a crime, and the standard of proof is clear and convincing evidence for violation of a release condition that does not constitute commission of a crime. *See* 18 U.S.C. § 3148.

A. Defendant Shall Not Commit Any Federal, State or Local Crime (Doc. 17)

The standard of proof is probable cause. *See* 18 U.S.C. § 3148.

1. *Witness Tampering in Violation 18 U.S.C. § 1512(b)(1)*

In the Petition and Supplemental Petition, the United States alleges that Defendant Harbour engaged in witness tampering in violation 18 U.S.C. § 1512(b)(1) by directing Kenneth Bobrow (“Bobrow”) to contact victims such as Mark Burg (“Burg”) and Richard Turasky (“Turasky”) in an effort to alter their testimony in exchange for payment of funds from a third party (Doc. 267; Doc. 290 at 1, ¶1). On the record before the Court at this time, the Court finds that probable cause has not been shown on each and every element.

2. *Conspiracy to Commit Wire Fraud, Bank Fraud, and False Statement on Loan and Credit Applications in violation of federal law*

In the Second Supplemental Petition, the United States alleges that Defendant Harbour conspired to commit wire fraud, bank fraud, and false statement on loan and credit applications in violation of 18 U.S.C. §§ 371, 1014, 1349, 1343, and 1344 (Doc. 326). In sum, the United States alleges that Defendant Harbour conspired with Bart Shea and Bobrow to provide a false gift letter by email to Equitable Home Mortgage, Inc. in support of a loan to purchase XXXX E. Georgia Ave., Phoenix, AZ 85016 (*Id.*).

...

1 Upon additional review of the record before the Court and review of the authorities
 2 cited by counsel, the Court finds that probable cause has been shown that Defendant
 3 Harbour conspired to commit wire fraud, bank fraud, and false statement on loan and credit
 4 applications in violation of 18 U.S.C. §§ 371, 1014, 1349, 1343, and 1344.

5 **B. Avoid all direct or indirect contact with persons who are considered**
 6 **alleged victim(s), potential witness(es) including Burg and Turasky (Doc. 17)**

7 In the Petition and Supplemental Petition, the United States alleges that Defendant
 8 Harbour directed Bobrow to contact Burg and Turasky between June 2020 and December
 9 13, 2021 (Doc. 267; Doc. 290 at 2, ¶3).

10 The standard of proof for this violation of release conditions is clear and convincing
 11 evidence. *See* 18 U.S.C. § 3148. While Bobrow is not a perfect witness, the phone records
 12 and other evidence corroborate Bobrow's statement to investigators that Defendant
 13 Harbour told Bobrow that Defendant Harbour wanted Bobrow to convince Burg to take
 14 the money (Government Exhibit 18 at ¶18). The Court finds that the United States has met
 15 its burden of clear and convincing evidence as to Burg but not as to Turasky.

16 **C. Defendant shall not solicit investors for any investment while on pretrial**
 17 **release (Doc. 17)**

18 In the Supplemental Petition, the United States alleges that Defendant Harbour
 19 successfully solicited Bobrow to invest \$142,000 for the purchase of the residence on
 20 Georgia Avenue, valued at \$3.7 million, for Defendant Harbour's benefit (Doc. 290 at 2,
 21 ¶3). The standard of proof for this violation of release conditions is clear and convincing
 22 evidence. *See* 18 U.S.C. § 3148.

23 The Court finds that the United States has not met its high burden of clear and
 24 convincing evidence regarding these allegations.

25 **D. Notify Pretrial Services of Financial Transactions (Doc. 221)**

26 In this allegation of the Supplemental Petition, the United States asserts that
 27 Defendant "Harbour borrowed approximately \$1,950,000 without seeking prior approval
 28 from Pretrial Services" (Doc. 290 at 2, ¶4). The standard of proof is clear and convincing

1 evidence. *See* 18 U.S.C. § 3148. The Court clarified on the record in open Court on
 2 December 21, 2021, at Defendant Harbour's initial appearance on the Supplemental
 3 Petition (Doc. 293) that the condition in Doc. 89 (referenced in the Second Supplemental
 4 Petition (Doc. 290 at 2, ¶4)) was amended on March 2, 2021, in Doc. 221, which would
 5 apply as of the time of the amendment. The pertinent replacement conditions in Doc. 221
 6 read:

7 2.) Defendant shall not obtain new financial accounts without prior
 8 notification to and approval from PTS. 3.) Defendant shall notify PTS of all
 9 financial transactions totaling over \$1,000 that he makes or directs to be
 10 made in any month to any person or entity, except for transactions that are
 11 for attorney's fees, professional fees, expenses or debts existing prior to the
 12 indictment, reoccurring payments, children's expenses, family expenses, and
 regular housing payments. Defendant does not, however, need to obtain
 PTS' approval for any expenses or income.

13 As previously discussed by the Court, these financial conditions were intended to
 14 restrict Defendant Harbour from "obtain[ing] new financial accounts without prior
 15 notification to and approval of Pretrial Services. *Debt to me seems like a new financial*
 16 *account.*" (Hr'g Tr. Dec. 29, 2021, p. 19 (emphasis added)).

17 The Court finds unavailing the defense arguments that the monies were advances of
 18 income, not loans, and therefore did not run afoul of release conditions. The Court finds
 19 that the United States has shown by clear and convincing evidence that Defendant Harbour
 20 violated his release conditions by borrowing money without complying with his conditions
 21 regarding such borrowing.

22 **II. DETENTION OR RELEASE ON CONDITIONS PENDING FURTHER** 23 **PROCEEDINGS**

24 In sum, Defendant Harbour violated his conditions of release in multiple ways while
 25 on pretrial release. Further, Defendant Harbour is a serious flight risk. While Defendant
 26 Harbour has appeared for Court and reported to Pretrial Services as directed thus far,
 27 Defendant's incentive to flee is great considering the potential sentence should he be
 28 convicted. This incentive increases as trial approaches, and there is the looming possibility

1 of additional charges relating to conduct at issue in the pretrial violations. Noteworthy is
2 that Defendant Harbour does not have a reliable third-party custodian available because
3 the people with whom he is close, including his spouse, appear to be aware of or involved
4 in the violations of his release conditions. Persons with whom Defendant Harbour is close
5 have been willing and able to provide Defendant Harbour with large sums of money, and
6 there is no effective way for the Court to effectively monitor, let alone control, Defendant
7 Harbour's access to large sums of money. The sums of money to which Defendant Harbour
8 has access dwarf the secured bond in this matter. Also noteworthy is that the Court has
9 already tried various iterations of financial restrictions in release conditions. Of great
10 concern to the Court is that Defendant Harbour appears to have structured financial
11 transactions in order to avoid having to report to Pretrial Services his receipt of significant
12 sums of money. New counsel's assurances at this stage of the case that Defendant Harbour
13 will take his release conditions more seriously and offer to pledge Defendant's interest in
14 future development proceeds are insufficient to mitigate flight risk even when coupled with
15 more restrictive conditions of release. The false gift letters pertaining to the Georgia
16 Avenue property demonstrate that Pretrial Services and the Court cannot rely on the
17 documents provided by Defendant Harbour being accurate.

18 Based on the evidence presented and having considered possible release conditions,
19 including those proposed by Defendant Harbour, such as electronic monitoring, home
20 detention/arrest, computer monitoring, financial monitoring, restrictions on
21 associations/communications, and considering the factors set forth in 18 U.S.C. § 3142,
22 the Court finds that there are not conditions the Court can set that can reasonably assure
23 the Defendant's appearance at future court proceedings and that Defendant Harbour is
24 unlikely to abide by any condition or combination of conditions of release. *See* 18 U.S.C.
25 § 3148.

26 Insofar as concerns about access to Defendant Harbour for trial preparation
27 purposes, counsel's access to Defendant Harbour for trial preparation purposes can be
28 addressed if and as any such issues arise. *See* 18 U.S.C. § 3142(i). The Court notes that

1 Defendant Harbour was present by video-teleconference at recent hearing settings.
2 Further, defense counsel has not reported any unusual or recent impairment in ability to
3 meet with Defendant Harbour.

4 **III. THE SECURED BOND (Doc. 43)**

5 The Court finds that forfeiture of the secured appearance bond (Doc. 43) is not
6 appropriate given that Defendant Harbour has not failed to appear. Further, it is not entirely
7 clear to the Court that the persons who posted such bond, Timothy and Julianne Gottschalk,
8 understood the bond to be to secure anything other than Defendant Harbour's appearances
9 in this matter. In addition, the secured appearance bond (Doc. 43) should not be released
10 until such time as any and all appeals of this Order are decided in the event that an appeal
11 may result in Defendant Harbour's release.

12 Accordingly,

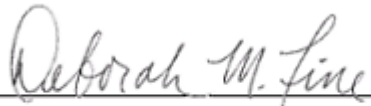
13 **IT IS ORDERED** granting in part and denying in part the United States' Petition
14 to Revoke Defendant Harbour's Pretrial Release (Doc. 267), Supplemental Petition (Doc.
15 290), and Second Supplemental Petition (Doc. 326) as set forth herein.

16 **IT IS FURTHER ORDERED** detaining Defendant Harbour pending further
17 proceedings.

18 **IT IS FURTHER ORDERED** that the secured bond (Doc. 43) shall not be released
19 until further Court order after any appeals are resolved.

20 **IT IS FURTHER ORDERED** acknowledging that this Order does not prevent
21 Defendant Harbour from seeking temporary release to the extent such release is necessary
22 for preparation of Defendant Harbour's defense or for another compelling reason pursuant
23 to 18 U.S.C. § 3148.

24 Dated this 1st day of March, 2022.

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26 
27 Honorable Deborah M. Fine
28 United States Magistrate Judge